UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal Docket No. 93-60-P-C***
	)	***(Civil Docket No. 00-293-P-C)***
CHARLES N. WATSON,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

The defendant, appearing *pro se*, moves pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. The defendant pleaded guilty to a charge of possession with intent to distribute heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). Judgment (Docket No. 24) at 1. He was sentenced on May 4, 1994 to a term of 216 months. *Id*. at 1-2. He contends that he was wrongly sentenced, based on the Supreme Court's subsequent decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000); that he received constitutionally insufficient assistance of counsel; that his sentence should be reduced due to rehabilitation efforts he has made during his incarceration; and that his present conditions of imprisonment violate the Eighth Amendment to the Constitution. Petition Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("Petition") (Docket No. 48) at 5-6. The government contends that the petition must be dismissed as untimely. Motion to Dismiss Petition Under 28 USC § 2255 to Vacate, Set Aside, or Correct Sentence, etc. ("Government's Response") (Docket No. 52) at 4-7.

The defendant first filed a petition invoking section 2255 in March 1997. Docket No. 37. Counsel was appointed to represent the defendant with respect to that petition. Docket No. 44. After the government filed its response to the petition, Docket No. 43, the defendant withdrew the petition, Docket No. 46. When he filed the instant petition, the defendant apparently also filed a request with the First Circuit Court of Appeals for leave to file a second or successive petition under section 2255. Judgment, *Watson v. United States*, United States Court of Appeals for the First Circuit, Docket No. 00-2240 (Docket No. 54), at [1]. Noting that it had previously ruled that the *Apprendi* decision had not been made retroactive by the Supreme Court, the First Circuit on November 20, 2000 denied the request, but also noted that, because the defendant's earlier petition was withdrawn before this court acted on it, the instant petition might not be a second or successive petition within the meaning of section 2255. *Id*. at [1]-[2]. Because the earlier petition terminated without a judgment on the merits, the instant petition is not a second or successive petition, *Sustache-Rivera v. United States*, 221 F.3d 8, 13 (1st Cir. 2000), and accordingly must be considered by this court as the defendant's first request for relief under section 2255.[1]

However, section 2255 also includes a statute of limitations which is applicable to this petition. The relevant portion of the statute provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> (**1**) the date on which the judgment of conviction becomes final;
>
> (**2**) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (**3**) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

[1] This conclusion renders moot the defendant's request that his petition be considered under 28 U.S.C. § 2241. Petitioner's Memorandum of Law and Response Rebuttal to Respondent's Motion to Dismiss Petitioner's 28 U.S.C. §2255 Motion ("Defendant's Reply") (Docket No. 53) at 8-10.

> (**4**) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255. There can be no question that the defendant has submitted the instant petition more than one year after the date on which the relevant judgment of conviction became final. With respect only to his claim based on *Apprendi*, the defendant contends that both subsection (2) and subsection (3) of the statutory definition of the date upon which the limitations period begins apply to his claim. Defendant's Reply at 2-6.

With respect to subsection (3), the petitioner argues at length that the *Apprendi* opinion must be interpreted as demonstrating the intent of the Supreme Court that its holding be applied retroactively. *Id*. However, the First Circuit has already held that "it is clear that the Supreme Court has not made the rule retroactive to cases on collateral review," *Sustache-Rivera*, 221 F.3d at 15, and accordingly no section 2255 claim based on *Apprendi* may proceed under subsection (3) in this circuit.

The defendant offers little argument in support of his contention that subsection (2) is applicable to his *Apprendi* claim, stating only that subsection (2) "is a reasonable alternative since it is the government who has been employing constitutionally deficient indictments in concert with Sentencing Guidelines to unlawfully take a defendant over the statutory maximum penalty at sentencing." Defendant's Reply at 6. This is not the type of impediment to which subsection (2) refers. Nothing "created by governmental action" prevented the defendant from bringing a timely petition under section 2255 taking the same position that that was successful for the defendant in *Apprendi*. Criminal defendants, as well as civil litigants, may often become aware of legal arguments that they could have made when a Supreme Court opinion is issued. That situation does not, and cannot, mean that the government or the opposing litigant in any sense prevented the defendant or the civil litigant from raising that argument himself at an earlier time.

The defendant does not address the government's timeliness argument with respect to any of his other three claims. Even if opposition to that argument could not therefore be considered waived, the defendant's ineffective-assistance-of-counsel claim is clearly untimely and relief on the remaining two claims is not available under section 2255.

The case law cited by the defendant in support of his claim based on rehabilitation while incarcerated deals with such downward departures in sentencing only when resentencing takes place for a reason independent of the rehabilitation, *United States v. Sally*, 116 F.3d 76, 77 (3d Cir. 1997), or when the rehabilitation at issue occurred before initial sentencing, *Koon v. United States*, 518 U.S. 81, 88 (1996); *United States v. Whitaker*, 152 F.3d 1238, 1239 (10th Cir. 1998); *United States v. Brock*, 108 F.3d 31, 33, 35 (4th Cir. 1997). Neither is the case here. This court has held that

> the post-conviction rehabilitation recognized in *Koon* as a basis for downward departure is conduct that occurs after conviction and before sentencing, not after sentencing. Even in the case law relied on by Defendant, post-sentencing rehabilitation is taken into account only when the defendant is resentenced for some reason other than the asserted rehabilitation. The only evidence of rehabilitation presented by this Defendant concerns his conduct in prison after sentencing.

United States v. Santiago, 2000 WL 760743 (D.Me. Mar. 21, 2000), at *1. In the absence of some other basis for resentencing, the court cannot consider post-sentencing rehabilitation, standing alone, as a basis for relief under section 2255. *Cruz v. United States*, 2000 WL 1510079 (S.D.N.Y. Oct. 10, 2000), at *9; *United States v. Dugan*, 57 F.Supp.2d 1207, 1209 (D.Kan. 1999).

The defendant's claim based on the conditions under which he is currently imprisoned must be addressed to the United States District Court having jurisdiction over the facility in which he resides. *United States v. DiRusso*, 535 F.2d 673, 675-76 (1st Cir. 1976). In addition, section 2255 does not provide a remedy for the defendant's Eighth Amendment claims. *Ruiz v. United States*, 2000 WL 1029186 (S.D.N.Y. July 24, 2000), at *1, and cases cited therein.

Conclusion

For the foregoing reasons, I recommend that the petition be **DISMISSED** without an evidentiary hearing. Such a dismissal will render moot the defendant's pending motions to transfer this case to the United States Court of Appeals for the Second Circuit (Docket No. 49), a motion that cannot be granted for other reasons as well, and for production of certain documents (Docket No. 50).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of December, 2000.

David M. Cohen
United States Magistrate Judge